

James Henderson, Chairman, called the meeting to order at 6:30pm and introduced the members present: John Papacosma (Vice-Chairman), Howard Nannen, Linda Toothaker, Roland Weeman, and associate members, Robert White and Don Rogers. Planner Tony Dater and Debora Levensailor, Planning Assistant, were also present.

**The published agenda for the meeting was:** Old Business: (1) Envision Realty, L.L.C., Subdivision Plan Review, Shoreland Residential, Tax Map 1-3, Skolfield Farm Shores, Harpswell (Return from 04-18-01 meeting). New Business: (2) Frank Kibbe, Great Wings Marine, L.L.C., Site Plan Review (Addition of Moorings), Shoreland Business, Tax Map 48-48, Harpswell Islands Road, Harpswell. (3) Town of Harpswell, Preliminary Discussion of Town Office Expansion, Tax Map 42-70, Resource Protection, Mountain Road, Harpswell. (4) Other Business the Planning Board May Wish to Consider.

**Minutes of May 2, 2001-** The minutes of May 2, 2001 were accepted as written, with the motion by Nannen. Weeman seconded. **Carried, 5-0.**

**Envision Realty, L.L.C.-** Papacosma referenced a letter from the Maine Department of Environmental Protection (DEP) concerning a dumpsite that the DEP has identified on the proposed subdivision property. Papacosma asked Leo Blair of Envision Realty, L.L.C. if he had received the letter and he said that he had.

Henderson said that the Board needs to discuss the wetlands issue as identified in the Subdivision Ordinance Section 9.10 (Impact on Wetlands), and if the proposed subdivision property complies with the ordinance. The Board reviewed the maps provided by the Maine Department of Inland Fisheries and Wildlife (IF&W) which show that IF&W has rated the wetlands surrounding Envision Realty, L.L.C.'s proposed subdivision property as moderate or high value. Henderson read part of Subdivision Ordinance 9.10 which states, "...Septic systems and structures must be set back at least two hundred-fifty (250) feet from the edge of moderate or high value wetlands or at least seventy-five (75) feet from the edge of all other wetlands." Papacosma stated, "I move that the Board finds that, on the basis of the information from the Maine Department of Inland Fisheries and Wildlife and the data from the Maine State Planning Office, that the proposed project we are considering abuts wetlands that are of high to moderate value." Henderson added an amendment to the motion, "We base our decision on the file copy received from the Department of Inland Fisheries and Wildlife.", which was accepted by Papacosma. Rogers seconded. **Carried 5-0.**

The Board also discussed the Shoreland Zoning Ordinance 13.1 (Resource Protection District), and Henderson and Dater asked Attorney John Bannon, the Town of Harpswell's attorney for this case, for his opinion on this issue. Attorney Bannon referenced the Shoreland Ordinance and said that the Citizen's Note on page 11 says, "All Resource Protection areas as defined above may or may not appear on the Official Shoreland Zoning Maps." In addition, he said that the Board "could go through the criteria on the opposite page, 13.1.1, and if you decide that anywhere on this property

there are one hundred year flood plains, areas within 250' of high value wetlands, etc., you could conclude that the property was zoned for Resource Protection even if the map did not show it that way." But, he did not recommend doing that because there have been one Maine State Supreme Court case and two Superior Court cases, one of which he litigated, in which it was decided that what's on the Resource Protection Map has to govern.

He said that, "The Maine Department of Environmental Protection's ruling is that if the property is not zoned for Resource Protection, the map must govern... You can override it if there are ambiguities about the Resource Protection boundary lines, if, for example, it's close to this property... If Resource Protection is no where near the property, the far more defensible position would be that the zoning map governs. Having said that, there is legal support in your Subdivision Ordinance to do the opposite... There's no question that this property should be Resource Protection based on what we've been told. And, I certainly recommend that the Town hurry up and do something about its Resource Protection areas so that the map reflects what's really out there on the face of the earth. But, for the time being, you can do either... I recommend against ruling that if there's a wetland, it's Resource Protection no matter what the map says... How you decide this issue affects this subdivision differently. If you decide according to the Subdivision Ordinance 9.10, the setback is there. Or, if you decide Resource Protection, it affects the uses that are allowed in that zone."

Dater asked Attorney Bannon, "In dealing with the setback, is that a pretty clear thing legally?" Bannon responded, "Yes, not only clear on the face of the ordinance, but it's clear under existing case law that that's a permissible regulation... The Resource Protection issue is not clear, but I don't see a way around Subdivision Ordinance 9.10." Henderson said the Board needed to have a finding of fact and that, "We can say, based on the legal advice we've received, this area is in a Resource Protection district or we can say it's not in Resource Protection because it's not on the map." Papacosma stated, "I move that the Board finds that this area is not designated Resource Protection as per our zoning map." Weeman seconded. **Carried 5-0.**

The Board discussed whether or not Subdivision Ordinance 9.10 (Impact on Wetlands) applied to the proposed project. Nannen said, "Given they've (the wetlands surrounding the proposed project) been identified by Inland Fisheries and Wildlife, we should be guided by 9.14." He read part of Subdivision Ordinance 9.14 which states, "The proposed subdivision plan will preserve the scenic and natural beauty of the area, aesthetics, historic sites, significant wildlife habitat identified by the Department of Inland Fisheries and Wildlife or the municipality, or rare and irreplaceable natural areas or any public rights for physical or visual access to the shoreline." Nannen said, "This is a significant consideration for the Board." The Board discussed this issue extensively. Nannen stated, "I would move that the Board finds Subdivision Ordinance Section 9.10 (Impact on Wetlands), specifically the requirement that septic systems and structures must be set back two hundred-fifty feet from high or moderate wetlands, does apply to the proposal and in addition, we cite Subdivision Ordinance 9.14 as further findings in

support of Subdivision Ordinance Section 9.10 to this proposal.” Papacosma seconded.

**Carried 3-2. (Weeman and Toothaker- No).**

Weeman said, “We’re on thin ice.” Papacosma said, “We are on firm ground on our own ordinance (Subdivision Ordinance) and Maine Inland Fisheries and Wildlife information.” Bannon responded, “Right.”

Henderson asked Leo Blair of Envision Realty, L.L.C., “Knowing they’re where they are, do you want to change the plan to accommodate the finding?” Blair discussed where the high and moderate value wetlands were with the Board and if Envision Realty, L.L.C. would be willing to reconfigure the lots. Dater said that some of the lots, numbers five and six, would have to be re-done, that there wasn’t enough room, perhaps, if they went back two hundred-fifty feet. And, Dater said the applicant might want to change the road. Henderson said that if that were the case, the map would have to be reconfigured. Blair said, “Our choice is not to reconfigure.”

The Board discussed all of Subdivision Ordinance Section 9, and notable points of discussion follow: 9.1 – Papacosma said that the letter from the DEP stated that it must be in conformity with all rules and regulations. 9.4- Henderson said, “We have an issue with lot nine, the multi-family unit.” Blair read part of Subdivision 9.4.1 which states, “...Only one (1) dwelling unit is allowed per lot.” Henderson said, “If that structure (Envision Realty, L.L.C.’s part of the farmhouse) became a single dwelling unit, it would be okay.” Dater said they would still have to create legal lots in terms of the Town Ordinance, and that the lot around the dwelling would have to be of legal size. Weeman stated that there had already been a division of the land by John Skolfield, Jr., and that if Envision Realty, L.L.C. divided it again, it would be three times and that would come under the Subdivision Ordinance review anyway. Bannon said, “Mr. Weeman’s comment is persuasive. I don’t see how it gets it out of subdivision review. Nothing I’ve seen convinces me otherwise.” Blair said to Henderson, “You’ve created new zoning tonight.” Henderson stated, “We have not.” Blair said, “If the ordinance says no other than a single family dwelling is allowed in a subdivision, it’s a threshold question.” Henderson stated, “There are certain things we would hope are different, but we’re not in the business of changing our ordinances.” The Board discussed 9.5 through 9.12. Blair said, “We’re not inclined to reconsider the reconfiguration. What you see is what you get.” Henderson said, “Given that information, that the proposal stands as it is, then we can look at the approval standards in light of what we have and ask, is this proposal approved or disapproved?” Blair said, “We’ll discuss the two hundred-fifty foot setback in another venue. The irony of it is wonderful, isn’t it?”

Based on the information that the applicant did not wish to reconfigure the plan, the Board once again reviewed Subdivision Ordinance Section 9 (Conformance) and notable points of discussion follow: Henderson again reviewed the DEP letter concerning the dumpsite on Envision Realty, L.L.C.’s property. Attorney Andrews Campbell, attorney for Barbara and Linda Barton, said that Envision’s covenants say 40% of the cutting of trees is allowed, in addition to what has already been cut. He said it would virtually strip the land of trees. He also stated that substantial erosion has already taken place on Envision’s property and submitted a 1970 photo to the Board, which he said shows that

about one hundred feet of sediment already surrounds the shoreline of the property. He said that there would be substantial additional wash from the proposed subdivision.

Attorney Bannon stated, "The Board has been informed you'll be sued. I recommend the Board be as careful as possible. The burden of proof is on the applicant... You can turn down the application if there's not enough evidence... You don't have to defend a basis to approve or deny."

Dater said, "The existing building envelope would leave a clearing that endangers high and moderate wetlands." Nannen agreed. Henderson allowed a member of the public, Amy Naylor-Hibble, a planner, to speak and she stated, "I find it hard to believe that this is the best that can be done (pointing to Envision Realty, L.L.C.'s plan). You don't have enough information to approve the plan." Henderson said that with regard to lot number nine, the proposal did not meet the requirements of Subdivision Ordinance 9.4.1. Bannon said that the Board only has to rule on what has been submitted by the applicant. Dater said, "We know that there are four dwelling units and that the lot area is not sufficient." Weeman stated, "I move that the Board finds that, relative to 9.4.1, the areas of lot nine and of lot two and the number of dwellings, do not meet the provisions of 9.4.1." White seconded. **Carried, 4-1 (Nannen-No).**

**9.6- Weeman asked to have it noted that the Board has the right to re-visit all of**

**9.6.2..** 9.6- Nannen stated, "I move that the Board finds that this proposal is in conformance with 9.6.4 of the Subdivision Ordinance." Toothaker seconded. **Carried, 5-0.** 9.7- Henderson stated, "I move that the Board finds the proposal conforms to the requirements of Subdivision Ordinance Section 9.7, on the condition that it meets the approval of the Codes Enforcement Officer's requirements as to the road setback from the high water mark, and that it follows the Best Management Practices of the Cumberland County Soil Conservation Standards." Weeman seconded. **Carried, 5-0.** 9.8- Weeman stated, "I move that the Board finds that the proposal meets the standards of Subdivision Ordinance Section 9.8, in particular, regarding that all utilities will be underground." White seconded. **Carried 5-0.** 9.9- Nannen stated, "I move that the Board finds that the proposal is in conformity with Subdivision Ordinance Section 9.9." Weeman seconded. **Carried, 5-0.** 9.10- Henderson stated, "I move that the Board finds, based on our findings of fact, that the development is on the edge of moderate or high value wetlands and that the building envelopes in the plan do not meet the two hundred-fifty foot setback lines. The Board also finds that the proposal doesn't conform to Subdivision Ordinance Section 9.10." Nannen seconded. **Carried 5-0.** 9.11- White stated, "I move that the Board finds that the conditions of 9.11 are met." Weeman seconded. **Carried, 5-0.** 9.12- Nannen stated, "I move that the Board finds that the proposal complies with 9.12, subject to its adherence to the Best Management Practices of the Cumberland County Soil Conservation Standards." Weeman seconded. **Carried 5-0.** The Board asked CEO Doug Webster if a well is considered to be a structure and Webster said a drinking well is not a structure. 9.13- Weeman stated, "I move that the Board finds that 9.13 is not applicable to the proposal." Nannen seconded. **Carried, 5-0.** 9.14- Henderson said, "We will require the applicant to pay for this archeological study." Bannon said, "The Ordinance does give the Board the authority to decide it's (the

farmhouse) historic and it can't be torn down. Anyone can destroy what they have. If it's your condition that it not be destroyed, then if it is, the condition would be violated." Henderson said that the Subdivision Ordinance says the plan will preserve historic sites. Nannen read part of the letter from the Maine Historic Preservation Commission which states, "...we strongly recommend a Phase I archeological survey for Native American sites of prehistoric and early Contact period age on all of proposed lot 8, and within 50 meters or 170 feet of the highest tide line along the shoreline of all the other lots..." Henderson said that the Board acted to contact Dr. Hamilton, archeologist. Nannen stated, "I move that the Board finds that the plan as submitted does not comply with the provisions of 9.14 in that it does not provide a plan designed to protect and preserve archeological and historical sites and that we make it a condition of approval of this plan that such protection and preservation be implemented, based upon the findings of the Planning Board's consultant with regard to potential archeological sites." White seconded. **Carried, 5-0.**

Henderson told Mr. Kibbe of Great Wings Marine, L.L.C. and the Town of Harpswell's representatives that their cases would not be heard this evening. Weeman stated, "I move that the Board hold a special meeting on May 29<sup>th</sup>, 2001 at 6:30pm." Nannen seconded. **Carried, 5-0.**

Henderson stated, "I move that the Board finds at least one historic site within the subdivision, namely the Skolfield farmhouse, which is on the National Registry of Historic Places, and that the proposed development does not have a plan to protect and preserve that site." Nannen seconded. **Carried, 4-1. (Toothaker-No).** Nannen stated, "I move that the Board finds that the proposal conforms to the requirements of 9.15 as submitted." Weeman seconded. **Carried, 5-0. Weeman wanted it noted that all of the Board's decision regarding this motion related to Envision Realty, L.L.C.'s plan dated April 13, 2001.**

Attorney Campbell asked that the Board establish a condition based on the good title of Envision Realty, L.L.C.

The Board continued their discussion of the Subdivision Ordinance Section 9: 9.16- Nannen stated, "I move that the Board finds that the proposal does not comply with the provisions of Subdivision Ordinance Section 9.16, and that their approval would depend on the applicant supplying an acceptable homeowners association document." White seconded. **Carried, 4-1 (Toothaker-No).** Dater said that a road in the subdivision would be used by all of the homeowners.

The Board reviewed Subdivision Ordinance Section 10 (Performance Guarantee). White said that the subdivision roads should be built according to the standards of the Harpswell Town Road Ordinance. Nannen stated, "I move that, prior to commencement of construction of the proposed subdivision, the Board require a performance guarantee in the form of an irrevocable letter of credit from a financial institution acceptable to the Selectmen in the amount of 125% of the cost of the requirements of 10.1 as set forth in

the Subdivision Ordinance 10.3.” Weeman seconded. **Carried, 5-0.** The Board is also requiring a complete set of the revised homeowner covenants.

Henderson stated, “I move that the Board finds that it cannot grant preliminary approval to the proposal based on findings it has made in the Subdivision Ordinance, and that it reserves its judgement on compliance with other ordinances of the Town, pending satisfaction of the Board’s objections under the Subdivision Ordinance.” **There was no second to this motion.**

Henderson again asked Blair, of Envision Realty, L.L.C., if he wanted to postpone the Board’s decision in order to give the applicant time to comply with the aforementioned requirements of the Subdivision Ordinances. Blair said that they would not give the Board more time to make a decision.

Henderson stated, “I move that the Board would grant preliminary approval subject to the conditions and requirements met in the findings of the previous motions.” **There was no second to this motion.**

Attorney Bannon told the Board that when there are this many conditions, it is difficult to grant preliminary approval.

Henderson stated, “Based on all of the evidence in the record and the findings of the Board, the applicant failed to comply with the Subdivision Ordinance Sections 9.4.1, 9.10, 9.14, and 9.16, and I move that the Board deny the approval of the proposed subdivision, based on its previous findings of fact, and with an indication by the applicant that they did not agree to further extend the period of time for the Planning Board’s decision.” White seconded. **Carried, 5-0.**

The Board discussed the agendas for the Board meetings of May 29, 2001 and June 20, 2001.

Henderson moved to adjourn the meeting at 11:25pm. Seconded by Weeman. **Carried, 5-0.**

Respectfully submitted,

Debora A. Levensailor  
Harpwell Planning Assistant

